

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANTRELL DANTE CONERLY,

Defendant-Appellant.

UNPUBLISHED
November 13, 2014

No. 318164
Genesee Circuit Court
LC No. 12-031224-FC

Before: WHITBECK, P.J., and FITZGERALD and MURRAY, JJ.

PER CURIAM.

Defendant, Dantrell Dante Conerly, appeals as of right his convictions, following a jury trial, of second-degree murder,¹ carrying a concealed weapon,² receiving or concealing a stolen firearm,³ and possession of a firearm during the commission of a felony (felony-firearm).⁴ The trial court sentenced Conerly to serve 360 to 600 months' imprisonment for his second-degree murder conviction, 24 to 60 months' imprisonment for his carrying a concealed weapon conviction, 24 to 120 months' imprisonment for his receiving or concealing a stolen firearm conviction, and two years' imprisonment for his felony-firearm conviction. We affirm.

I. FACTS

A. BACKGROUND FACTS

Darwin Groves testified that the victim, Marcus Payne, was his neighbor. According to Groves, shortly before 2:00 a.m. on the morning of July 2, 2012, Payne was attempting to open Groves's door and appeared drunk or high. Groves went outside to help Payne to Payne's house. Payne was jovial, singing, and dancing.

¹ MCL 750.317.

² MCL 750.227(2).

³ MCL 750.535b.

⁴ MCL 750.227b.

Payne went to the McDonald's parking lot directly next to Groves's home and started singing and dancing near the drive-thru window. Groves called 911 because he was concerned that Payne could get hurt. Groves heard two gunshots and saw that a black Grand Prix in the drive-thru had a gun at the edge of its open passenger-side window. At that time, Payne was five or six feet away from the Grand Prix, had his hands in the air, and was not armed.

Latesha Robinson testified that she and Conerly were in her black Grand Prix. According to Robinson, she noticed Payne dancing, talking, and waving his arms near the dumpster area in front of her vehicle. Robinson watched Payne dance for three to four minutes. Payne did not have a weapon and did not touch her vehicle. She was talking to a McDonald's employee when she heard two shots come from inside her car.

Conerly testified that Payne rushed his car while slurring words. Conerly drew his gun and told Payne to get away from the car. According to Conerly, Payne responded by saying "I'll kill you" and then approached the car a second time. Conerly could not see Payne's left hand and was worried that Payne might have a knife. Conerly testified that he shot Payne after Payne came within two feet of the vehicle.

Calvin Childs testified that he was in line at the McDonald's drive-thru and saw Payne dancing and listening to music in the parking lot. According to Childs, Payne exchanged words with passengers in a black Grand Prix, which was two cars ahead of Childs's van in the drive-thru. Childs saw Payne put his hands in the air and saw a black handgun come out of the Grand Prix's passenger window. Payne's hands were open and empty. The gun went back inside the passenger window and it looked like Payne was about to walk off, but he turned around and continued arguing. The gun came out of the window and fired two shots. According to Childs, Payne never went near the Grand Prix.

Joshua Hendrick testified that he was in line between the Grand Prix and Childs's van in the drive-thru. According to Hendrick, Payne was being loud, dancing, and clapping his hands in the parking lot. Payne talked to the people in the Grand Prix and went within two feet of the Grand Prix, but he never attempted to reach toward the vehicle. Hendrick testified that Payne had nothing in his hands and did not appear armed, but he did say to Conerly that he was "going to get my boy to get you."

Payne was pronounced dead when police arrived. Dr. Brian Hunter testified that Payne died of a gunshot wound to the chest and that Payne was most likely shot from a distance of more than three feet.

Michigan State Police Trooper Michael Troutt testified that he found Conerly and Robinson arguing in a black Grand Prix a short distance from the McDonald's. Flint Township Police Department Officer Nicholas Sabo testified that he found a black handgun under the Grand Prix's passenger seat where Conerly had been sitting. Regina Knuckles testified that she was the registered owner of the handgun, but that it was stolen from her vehicle in April 2012. Conerly testified that he purchased the gun from a friend for \$200 in cash in May or June of 2012. According to Conerly, he did not obtain a receipt or register the gun, even though he knew that he was supposed to do so.

B. PROCEDURAL HISTORY

Before trial, defense counsel filed a motion in limine to determine the type of self-defense instruction to give the jury. The trial court denied the motion on the basis that it did not know which instruction would be appropriate until the facts of the case developed. After the close of evidence, the trial court and attorneys discussed the jury instructions. The trial court determined that Conerly was entitled to a common-law self-defense instruction because a reasonable jury could conclude that Conerly had an honest belief that he was facing serious injury or threat of death. Consistent with the model jury instructions, the trial court instructed the jury that a person who acts in lawful self-defense is not guilty of murder.

II. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

A claim that the evidence was insufficient to convict a defendant invokes that defendant's constitutional right to due process of law.⁵ Thus, this Court reviews de novo a defendant's challenge to the sufficiency of the evidence supporting his or her conviction.⁶ We review the evidence in a light most favorable to the prosecutor to determine whether a rational trier of fact could find that the prosecutor proved the elements of the crime beyond a reasonable doubt.⁷

B. LEGAL STANDARDS

MCL 750.535b(2) prohibits receiving or concealing a stolen firearm. Mere possession of stolen property is not sufficient to establish that the defendant received or concealed it.⁸ To prove that a defendant received or concealed a stolen firearm, the prosecutor must prove that

(1) received, concealed, stored, bartered, sold, disposed of, pledged, or accepted as security for a loan (2) a stolen firearm or stolen ammunition (3) knowing that the firearm or ammunition was stolen.^[9]

C. APPLYING THE STANDARDS

Conerly contends that there was insufficient evidence to support his conviction of receiving or concealing a stolen firearm because there was no evidence that Conerly knew that the gun was stolen. We disagree.

⁵ *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992); *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970).

⁶ *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011).

⁷ *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012).

⁸ *People v Lauzon*, 84 Mich App 201, 207; 269 NW2d 524 (1978).

⁹ *People v Nutt*, 469 Mich 565, 593; 677 NW2d 1 (2004).

Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime, including the defendant's knowledge.¹⁰ Among other things, the defendant's possession of a stolen item shortly after it was stolen, the purchase price of the article compared with its value, and a lack of reasonable explanation for possessing a stolen item may support an inference that the defendant knew the item was stolen.¹¹ Jurors may use common sense and everyday experience to evaluate evidence.¹²

Here, Knuckles testified that her handgun was stolen in April 2012. Conerly testified that he purchased the handgun in May or June 2012, he paid \$200 in cash, and did not receive a receipt. Conerly also testified that he did not register the handgun despite knowing that he was supposed to do so.

Viewing this evidence in the light most favorable to the prosecutor, we conclude that it sufficiently supported Conerly's conviction of receiving and concealing a stolen firearm. The manner of purchase and Conerly's failure to register the handgun when he knew that the law required him to do so allowed the jury to reasonably infer that Conerly knew that the handgun was stolen.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

A criminal defendant has the fundamental right to effective assistance of counsel.¹³ A defendant's ineffective assistance of counsel claim "is a mixed question of fact and constitutional law."¹⁴ Generally, when reviewing an ineffective assistance of counsel claim, this Court reviews for clear error the trial court's findings of fact, and reviews de novo questions of law.¹⁵ But a defendant must move the trial court for a new trial or evidentiary hearing to preserve the defendant's claim that his counsel was ineffective.¹⁶

¹⁰ *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008).

¹¹ *People v Salata*, 79 Mich App 415, 421-422; 262 NW2d 844 (1977).

¹² *People v Simon*, 189 Mich App 565, 568; 473 NW2d 785 (1991).

¹³ US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

¹⁴ *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

¹⁵ *Id.*

¹⁶ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008).

Here, Conerly has not preserved his claim of ineffective assistance of counsel. Accordingly, our review is limited to mistakes apparent from the record.¹⁷

B. LEGAL STANDARDS

To prove that his defense counsel was not effective, the defendant must show that (1) defense counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that counsel's deficient performance prejudiced the defendant.¹⁸ We must presume that counsel provided effective assistance.¹⁹ When considering an unpreserved claim of ineffective assistance of counsel, we must consider the possible reasons for counsel's actions.²⁰ A defendant was prejudiced if, but for defense counsel's errors, the result of the proceeding would have been different.²¹

C. APPLYING THE STANDARDS

Conerly contends that defense counsel rendered ineffective assistance when he failed to request a jury instruction specifically stating that the prosecutor had the burden to prove that Conerly did not act in self-defense. We disagree.

The trial court must "properly instruct the jury so that it may correctly and intelligently decide the case."²² Defense counsel is not ineffective for failing to request a jury instruction that does not apply in a given case.²³ However, it is well-settled that "the prosecution bears the burden of disproving the common law defense of self-defense beyond a reasonable doubt."²⁴

Michigan's model jury instructions provide that the trial court should instruct the jury that "the prosecutor must prove beyond a reasonable doubt that the defendant did not act in self-defense" when there is some evidence that the defendant acted in self-defense.²⁵ Here, self-defense formed the entire basis of Conerly's defense. The parties engaged in extensive pre- and post-trial discussion of the appropriate self-defense instructions. The burden of proof instruction

¹⁷ See *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

¹⁸ *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

¹⁹ *Unger*, 278 Mich App at 242.

²⁰ *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012).

²¹ *Pickens*, 446 Mich at 312.

²² *People v Clark*, 453 Mich 572, 584-585; 556 NW2d 820 (1996).

²³ *People v Norman*, 176 Mich App 271, 276; 438 NW2d 895 (1989).

²⁴ *People v DuPree*, 486 Mich 693, 697; 788 NW2d 399 (2010).

²⁵ Both the former model jury instruction CJI2d 7.20 and the current M Crim JI 7.20 contain identical language.

is a standard self-defense instruction, and its use note provides that the trial court should give the instruction where there is some evidence that the defendant acted in self-defense. We are unable to think of any possible reason why defense counsel would omit this instruction as a matter of trial strategy in this case. It appears that the omission was inadvertent. Given that self-defense formed the entire basis of Conerly's claim, we include that defense counsel's omission of this instruction was objectively unreasonable.

But to show ineffective assistance of counsel, a defendant must also demonstrate "a reasonable probability that but for the unprofessional errors the result of the proceeding would have been different[.]"²⁶ Here, the trial court instructed the jury that the prosecutor had the burden to prove Conerly guilty beyond a reasonable doubt. It further instructed that Conerly was "not required to prove his innocence or do anything." Finally, the trial court also instructed the jurors that they could not find Conerly guilty of murder if they found that Conerly acted in lawful self-defense.

Given the sufficiency of the trial court's correct general instructions regarding the burden of proof, we conclude that it is not reasonably probable that the result of the proceeding would have been different had the trial court issued this instruction. The jury was aware that the prosecutor had to prove Conerly's guilt beyond a reasonable doubt, that Conerly did not have to prove anything, and that Conerly's action may have been justified by self-defense. Had the jury believed that Conerly acted in self-defense, it would have acquitted him.²⁷ Accordingly, we conclude that Conerly has not shown that defense counsel's failure to request this instruction prejudiced him.

IV. CONCLUSION

We conclude that the jury had sufficient evidence from which to convict Conerly of receiving and concealing stolen property. We also conclude that Conerly has not shown that defense counsel's failure to request a jury instruction of the prosecutor's burden to disprove self-defense prejudiced him.

We affirm.

/s/ William C. Whitbeck
/s/ E. Thomas Fitzgerald
/s/ Christopher M. Murray

²⁶ *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997).

²⁷ See *People v Esters*, 417 Mich 34, 56; 331 NW2d 211 (1982).